SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 175

THE UNITED STATES OF AMERICA, PETITIONER

vs.

OLE BERKENESS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the District Court for the Territory of Alaska,
Fourth Judicial Division.

United States of America,
Territory of Alaska,
Fourth Judicial Division,—ss.

CERTIFICATE OF CLERK U. S. DISTRICT COURT RE APPEAL.

I, Rob't W. Taylor, Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, hereby certify that this appeal is being made by the United States Government and that no money has been or will be paid therefor.

IN WITNESS WHEREOF I have hereunto set my hand and seal of the above-entitled court this 22 day of June, 1926.

[Seal] ROBT. W. TAYLOR,
Clerk.
By Claire Stanfield,
Deputy.

NAMES OF ATTORNEYS OF RECORD.

JULIEN A. HURLEY, United States Attorney,
Attorney for Plaintiff.

No Attorney for Defendant.

In the District Court for the Territory of Alaska, Fourth Division.

No. 2758—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OLE BERKNESS,

Defendant.

COMPLAINT.

COMES NOW the plaintiff above named and for cause of suit against the above-named defendant, complains and alleges:

I.

That plaintiff, United States of America, is a corporation sovereign and this suit is prosecuted in its name and on its behalf by Julien A. Hurley, United States Attorney for the Fourth Division of the Territory of Alaska, pursuant to authority thereto granted by Sections 19 and 20 of the Act of Congress approved February 14, 1917, commonly known as the Alaska Dry Law and by the Judicial Code of the United States and for the purpose of enjoining and abating a certain common and public nuisance as defined in said Section 19 and 20 of said Act and now existing on certain premises situated within the Fourth Division of the Territory of Alaska, more particularly described in that paragraph of this complaint, numbered and marked III.

II.

That this is a suit of a civil and equitable nature arising under the Constitution and laws of the United States, and jurisdiction is given thereof to this Honorable Court by said Sections 19 and 20 and by the Judicial Code of the United States.

III.

That the description of the premises (hereinafter referred to as "said premises"), upon which said common and public nuisance exists is as follows, to wit: That certain building located upon Lot 4 of Block 82, in the Town of Fairbanks, Territory and Division aforesaid.

IV.

That the said defendant is the owner of said premises, and [1*] on the 5th day of May, A. D. 1925, said defendant had in his possession at and in said premises intoxicating liquor, to wit, beer and wine, and was engaged therein, in manufacturing intoxicating liquor, to wit, beer, which said liquor was kept and stored in said premises and was being manufactured therein by said defendant, in violation of the provisions of the Act of Congress, approved February 14, 1917, commonly known as the Alaska Dry Law, and particularly in violation of Sections 19 and 20 of said Act.

That said defendant has for a long time prior to the 5th day of May, 1925, kept and maintained said premises as a common and public nuisance, and

*Page number appearing at foot of page of original certified Transcript of Record.

has, during said time, kept intoxicating liquor in his possession, and stored in said premises.

That on the 5th day of May, A. D. 1925, the said defendant had in his possession at and in said premises the following contraband intoxicating liquor and property in violation of said Act of Congress, and particularly in violation of Sections 19 and 20 of said Act, to wit:

99 Full Bottles of Beer.
1 Sack Bottle Caps.
1 Copper Boiler.
1 50-Gal. Bbl. of Wine.
6 Cans Malt Syrup.
7 Pkgs of Hops.
11 Pounds of Caps.
1 50-Gal. Bbl. full of Beer Mash in the process of being manufactured.
1 Watch.
3 Feet Syphon Hose.
1 Beer Thermometer.
8 Glasses.
2 Spiggots.
1 Bottle Labeled "Certo"
1 Small Funnel.
1 Bottle Capper.
1 Bill File and Bills.
2 Calenders.
15 Pounds Sugar.
15 Pounds Cornmeal.
12 Pounds Figs.
1 Bunch Keys.
1 Large Funnel.

2 Pcs. Copper Pipe.
1 Sack Corks.
6 Bottles Liquid having an Odor of Garlic.
5 Sacks Used Hops.
1 50-Gal. Bbl. Empty.
1 100# Butter Bbl.
1 Lot Empty Bottles.
1 10-Gal. Keg Empty.
1 8-Gal. Still Complete.
1 Copper Bottom Wash Boiler.
1 50-Gal. Bbl. Cut down 1/3.
1 Lot Empty Bottles.

That on the 5th day of May, A. D. 1925, the said defendant [2] maintained and conducted a common and public nuisance on said premises in violation of the provisions of the Act of Congress, approved February 14, 1917, commonly known as the Alaska Dry Law, and will continue to conduct said premises as a common and public nuisance unless restrained by this Honorable Court.

V.

That plaintiff has no plain, speedy and adequate remedy at law.

WHEREFORE, plaintiff prays that this Honorable Court shall enter Judgment and Decree herein, directing and ordering that no intoxicating liquors shall be manufactured, kept or stored, in said premises, or any part thereof, and that said premises shall be perpetually closed and enjoined and that said defendant be perpetually enjoined from using the same as a nuisance, as defined in said

Sections 19 and 20 of the Alaska Dry Law and that said premises be closed and locked for the period of one (1) year; that such other relief be granted by this Court as is just and equitable under the law and facts of this case and that plaintiff have its costs and disbursements herein.

JULIEN A. HURLEY,

United States Attorney for the Fourth Division of the Territory of Alaska and Attorney for Plaintiff.

[Endorsed]: Filed May 6, 1925. [3]

United States of America,
Territory of Alaska,—ss.

I, Julien A. Hurley, being first duly sworn, upon oath depose and say:

That I am United States Attorney for the Fourth Division of the Territory of Alaska; that I appear for and represent the United States of America, the above-named plaintiff; that I have read the foregoing complaint, know the contents thereof and have signed the same in my own proper handwriting; that the allegations contained in said complaint are true as I verily believe.

JULIEN A. HURLEY.

Subscribed and sworn to before me this 6th day of May, A. D. 1925.

[Seal] M. O. CARLSON,
Notary Public for Alaska.

My commission expires April 15, 1928.

United States of America,
Territory of Alaska,—ss.

I, Julien A. Hurley, United States Attorney and attorney for plaintiff herein, hereby certify that the foregoing complaint is a true and correct copy and transcript of the original complaint on file herein of the whole thereof.

Dated at Fairbanks, Alaska, this ——day of May, A. D. 1925.

_____,
United States Attorney and Attorney for Plaintiff.

[4]

[Title of Court and Cause.]

ANSWER.

The defendant for answer to the complaint herein admits that he is the owner of Lot 4 of Block 82 in the Town of Fairbanks and the building located thereon but denies each and every other material allegation contained in paragraphs I, II, III, IV of said complaint.

WHEREFORE defendant having fully answered the complaint herein, prays that the plaintiff take nothing by said complaint and that the defendant have his costs and disbursements in this behalf expended.

OLE BIRKENES,
Defendant.

Service of the foregoing answer by receipt of a copy thereof is hereby acknowledged this 5th day of June, 1925.

JULIEN A. HURLEY,
Attorney for Plaintiff.

[Endorsed]: Filed Jun. 5, 1925. [5]

[Title of Cause.]

TRIAL BY THE COURT.

Now on this day this cause came on regularly for trial, the United States of America appearing by and through Julien A. Hurley, United States Attorney, the defendant being present and represented by Thomas A. Marquam, Esq., and both sides announcing themselves ready for trial, the following proceedings were had, to wit:

Thomas J. McCroskey, being first duly sworn, testified for and in behalf of the plaintiff.

Certified copy of affidavit by Thos. J. McCroskey for search-warrant was duly offered and marked as Plaintiff's Identification "A."

Certified copy of affidavit by D. W. Flanigan for search-warrant was duly offered and marked as Plaintiff's Identification "B."

Certified Copy of affidavit by H. E. Seneff for search-warrant was duly offered and marked as as Plaintiff's Identification "B."

Certified copy of search-warrant, inventory and marshal's return (attached) in this cause were

duly offered and marked as Plaintiff's Identification "D."

H. E. Seneff, being duly sworn testified for and in behalf of the plaintiff.

Plaintiff rests.

Defendant rests.

WHEREUPON, this cause being submitted without argument and the Court being fully and duly advised in the premises,—

IT IS ORDERED that this cause be and is hereby dismissed.

Entered in Court Journal No. 16, page 596.

April 1, 1926. [6]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause coming on regularly for trial on Thursday, the first day of April, 1926, and the plaintiff, United States of America, appearing by Julien A. Hurley, United States Attorney, and the defendant appearing by T. A. Marquam, Esq., and the said Julien Hurley and the said T. A. Marquam announcing to the Court that they were then and there ready to proceed with the trial of this cause; whereupon testimony of witnesses, T. J. McCroskey and H. E. Seneff, and certain exhibits as documentary proof were offered in evidence on behalf of the plaintiff, objected to by defendant and excluded by the Court and the Court having con-

sidered the testimony so offered on behalf of the plaintiff and the petition for the suppression of evidence filed herein on behalf of the defendant, and being fully advised in the premises, makes and enters the following

FINDINGS OF FACT.

I.

That plaintiff has failed to show or prove or offer to prove by any competent or legal testimony that the defendant, Ole Berkeness, on the fifth day of May, 1925, or at any other time, was engaged in maintaining a public nuisance as defined in sections 19 and 20 of the Act of Congress, approved February 14, 1917, commonly known as the Alaska Dry Law, and as alleged in plaintiff's complaint on file herein.

II.

That defendant's petition for the suppression of evidence, [7] filed herein, was properly allowed by this Court and that the evidence secured under the search-warrant, offered in evidence in this case, was properly excluded by this Court.

Based upon the foregoing findings of fact the Court makes and enters the following

CONCLUSIONS OF LAW.

I.

That the equities are with the defendant in this suit.

II.

That defendant is entitled to the judgment and decree of this Court dismissing this suit.

Dated and signed at Fairbanks, Alaska, this 21st day of May, 1926.

CECIL H. CLEGG,
District Judge.

Entered in Court Journal No. 16, page 615.
Filed May 21, 1926. [8]

In the District Court for the Territory of Alaska,
Fourth Division.

No. 2758—CIVIL.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

OLE BERKENESS,
Defendant.

JUDGMENT AND DECREE.

Based upon the findings of fact and conclusions of law heretofore filed herein, and the Court being fully advised in the premises, WHEREFORE,

IT IS HEREBY CONSIDERED, ORDERED, ADJUDGED AND DECREED, that plaintiff's suit herein be and the same is hereby dismissed.

IT IS HEREBY FURTHER ORDERED AND ADJUDGED that defendant recover of and from the plaintiff herein his costs and disbursements to be taxed.

Done in open court at Fairbanks, Alaska, this 21st day of May, 1926.

CECIL H. CLEGG,
District Judge.

Entered in Court Journal No. 16, page 616.

[Endorsed]: Filed May 21, 1926. [9]

[Title of Court and Cause.]

NOTICE OF T. A. MARQUAM.

To Whom It may Concern:

Having performed the services for which I was employed in the above-entitled cause, my connection therewith has ceased and for that reason I am no longer attorney for the defendant in said action.

T. A. MARQUAM.

[Endorsed]: Filed May 21, 1926. [10]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that this cause came on regularly for trial on Thursday, the 1st day of April, 1926, at the hour of 2:00 o'clock P. M., before the Hon. Cecil H. Clegg, the Judge of the above-entitled court; the plaintiff appearing by Julien A. Hurley, Esq., United States Attorney; and the defendant appearing by Thomas A. Marquam, Esq.; whereupon the following testimony was offered and proceedings had, to wit:

TESTIMONY OF T. J. McCROSKEY, FOR THE GOVERNMENT.

T. J. McCROSKEY, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HURLEY.)

Q. Will you state your name?

A. T. J. McCroskey.

Q. What official position, Mr. McCroskey, did you hold, if any, in Fairbanks, in the Fourth Division, Territory of Alaska, on the 5th day of May, 1925?

A. Chief Deputy United States Marshal for the Fourth Division. [11]

Q. Had you been Chief Deputy United States Marshal for some time prior to that time?

A. I had; yes.

Q. And for some time after the 5th of May, 1925, were you Chief Deputy United States Marshal?

A. Until August 1st, last year.

Mr. HURLEY.—I would like to have this affidavit marked Plaintiff's Exhibit "A" for Identification.

The COURT.—Is that satisfactory to counsel?

Mr. MARQUAM.—For identification. What is the Clerk going to mark?

Mr. HURLEY.—A certified copy of one of the affidavits.

(Affidavit referred to marked Plaintiff's Exhibit "A" for Identification.)

Mr. HURLEY.—I will ask that this affidavit for

(Testimony of T. J. McCroskey.)

search-warrant be marked Plaintiff's Exhibit "B" for Identification, an affidavit of D. W. Flanigan.

(Affidavit referred to marked Plaintiff's Exhibit "B" for Identification.)

And this certified copy of an affidavit of H. E. Seneff be marked Plaintiff's Exhibit "C" for Identification.

(Affidavit referred to marked Plaintiff's Exhibit "C" for Identification.)

And this certified copy of search-warrant and Marshal's Return, I will ask that it be marked Plaintiff's Exhibit "D" for Identification.

(Document referred to marked Plaintiff's Exhibit "D" for Identification.)

Mr. MARQUAM.—What paper is that, please?

Mr. HURLEY.—Search-warrant and return. [12]

Mr. MARQUAM.—And three affidavits?

Mr. HURLEY.—McCroskey's, Flanigan's and Seneff's affidavits, and the search-warrant, together with the inventory and return, marked Plaintiff's Exhibit "D" for Identification.

Q. Mr. McCroskey, calling your attention to Plaintiff's Exhibit "A" for Identification, I will ask you to state, if you know, what that certified copy of affidavit is.

Mr. MARQUAM.—We object as incompetent. The instrument will speak for itself, I should think.

The COURT.—He may identify it.

A. It is an affidavit signed by myself on May 5th of last year.

(Testimony of T. J. McCroskey.)

Q. Before whom?

A. Before M. R. Boyd, Commissioner.

Mr. HURLEY.—We offer the certified copy of the affidavit for search-warrant signed by T. J. McCroskey and marked Plaintiff's Exhibit "A" for Identification in evidence as Plaintiff's Exhibit "A."

Mr. MARQUAM.—We object to it as incompetent. It has been shown in a case arising out of this same transaction that the search-warrant was void and it was so held by the Court. The evidence was suppressed as if it never existed. It can't be used for any purpose and we object to its introduction for that reason. It was stipulated in the presence of the Court in chambers, between counsel, so there would be no misunderstanding about that, that the ruling of the Court relative to the validity of the search-warrant in the case of United States vs. Ole Berkeness, being Criminal case No. 944, would apply in this case as in the criminal case. [13]

Mr. HURLEY.—My understanding was that the petition for the suppression of evidence could be considered in this case but I didn't agree that the ruling of the Court would apply in this case.

The COURT.—I recall that it was agreed to by the attorneys before the Court in chambers but, of course, that doesn't appear here in the record. I think you ought to consider the petition that was filed for the suppression of evidence in the case of United States vs. Ole Berkeness, Criminal Case No. 944, as part of this case.

(Testimony of T. J. McCroskey.)

Mr. MARQUAM.—That was the substance of our stipulation.

Mr. HURLEY.—I am willing to stipulate that the petition that was filed in Criminal case No. 944, United States vs. Ole Berkeness, petition for the suppression of evidence may be considered by the Court in this case.

The COURT.—So considering it, the Court will have to sustain the objection.

Mr. HURLEY.—We desire an exception.

The COURT.—Exception allowed.

Q. Calling your attention to the certified copy of affidavit for search-warrant signed by D. W. Flanigan and marked Plaintiff's Exhibit "B" for Identification, I will ask you to state, if you know, what that is.

A. That is an affidavit signed by D. W. Flanigan on the same date, May 5th of last year.

Q. And before whom?

A. M. R. Boyd, Commissioner.

Q. The United States Commissioner for Fairbanks Precinct? A. Yes, sir. [14]

Mr. HURLEY.—I offer—

The COURT.—(Interrupting.) If you want to preserve your record now you will have to make an offer of this affidavit I have excluded in order to get it in the record.

Mr. HURLEY.—I made an offer of the affidavit.

The COURT.—But it doesn't show what it is. You will have to read it into the record if you want to preserve the record, otherwise you have no record to go up on.

Mr. HURLEY.—I will ask permission, if the Court please, to read the affidavit in the record and offer it in evidence as Government's Exhibit "A," an affidavit for search-warrant by T. J. McCroskey. (Reading:)

GOVERNMENT'S EXHIBIT "A."

"AFFIDAVIT FOR SEARCH-WARRANT.

"United States of America,

"Territory of Alaska, —ss.

"I, T. J. McCroskey, being first duly sworn, upon oath depose and say:

"That I am a Deputy United States Marshal for the Fourth Division of the Territory of Alaska; that on the evening of the 4th day of May, 1925, I was within a short distance of that certain building located on Lot 4 of Block 82 and occupied and controlled by one Ole Berkeness and at said time I could plainly smell the odor of intoxicating liquor and know that the same came from liquor kept and stored by the said Ole Berkness, within said building;

"That on several occasions prior to the 4th day of May, 1925, I was within a very short distance of the building above described and could plainly smell the odor of intoxicating liquor and know that the same came from [15] liquor kept and stored by the said Ole Berkness in the building above described; that as a Deputy United States Marshal, I have had a great deal of experience in handling intoxicating liquor and am familiar with the odor of the same.

"T. J. McCROSKEY.

"Subscribed and sworn to before me this 5th day of May, A. D. 1925.

"M. R. BOYD,

"United States Commissioner for Fairbanks Precinct."

And the seal of the Commissioner of Fairbanks Precinct, Fourth Division, Territory of Alaska.

"In the District Court for the Territory of Alaska.
Fourth Judicial Division.

"United States of America,
"Territory of Alaska,
"Fourth Judicial Division,—ss.

"CERTIFICATE.

"I, Robt W. Taylor, Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, hereby certify that the foregoing and hereto attached one pages of typewritten matter constitutes a full, true, and complete copy, and the whole thereof, of Affidavit of T. J. McCroskey for search-warrant in Cause No. 2758, entitled United States of America, Plaintiff, vs. Ole Berkness, Defendant, as the same appears on file and of record in this office.

"In witness whereof, I have hereunto set my hand and the seal of the above-entitled court this 1st day of April, 1926.

"ROBT. W. TAYLOR,
"Clerk."

And the seal of said Court.

Mr. MARQUAM.—To which offer the defendant objects for [16] the reason that the same is in-

competent under the stipulation between counsel that the Court may consider as filed in this case the motion for the suppression of evidence, which motion is supported by the affidavit of the defendant showing that the building for the search of which a search-warrant was asked was the residence of the defendant and occupied by him as such, and the Court having sustained that motion, the introduction in evidence of the affidavit for the issuance of the search-warrant is incompetent and objection is raised for that reason.

The COURT.—The objection will be sustained and the offer denied.

Mr. HURLEY.—Save an exception.

The COURT.—Exception allowed.

Mr. HURLEY.—We desire at this time to offer in evidence Government's Exhibit "B" for Identification, which is as follows: (Reading:)

GOVERNMENT'S EXHIBIT "B."

"AFFIDAVIT FOR SEARCH-WARRANT.

"United States of America,

"Territory of Alaska,—ss.

"I, D. W. Flanigan, being first duly sworn, upon oath depose and say:

"That I am a Federal Prohibition Agent for the Territory of Alaska and as such agent have had a great deal of experience in handling intoxicating liquor and am familiar with the odor of the same;

"That Ole Berkness has in his possession, in that certain building situated on Lot 4 of Block 82, of the Town of Fairbanks, Alaska, intoxicating liquor,

which is kept and stored in said building by the said Ole Berkness, in [17] violation of the provisions of the Alaska Dry Law;

"That on the 4th day of May, 1925, I was within 10 or 12 feet of the building above described and could plainly smell the odor of intoxicating liquor and know that the said odor came from the said intoxicating liquor within the building above described; that at said time I could plainly hear several people talking within said building;

"That on the 5th day of May, 1925, I was within a short distance of the above-described building and could plainly smell the odor of intoxicating liquor and know that said odor came from intoxicating liquor kept and stored by the said Ole Berkness within the above-described building; that at said time I heard loud talking within said building by several men such as would come from men who had been drinking.

"D. W. FLANIGAN.

"Subscribed and sworn to before me this 5th day of May, A. D. 1925.

"M. R. BOYD,

"United States Commissioner for Fairbanks Precinct."

And the seal of the Commissioner.

"In the District Court for the Territory of Alaska,
Fourth Judicial Division.

"United States of America,
"Territory of Alaska,
"Fourth Judicial Division,—ss.

"CERTIFICATE.

"I, Rob't W. Taylor, Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, hereby certify that the foregoing and hereto attached one pages of typewritten matter, constitutes a full, true, and complete copy, and the whole thereof, of Affidavit [18] of D. W. Flanigan for search-warrant in Cause No. 2758, entitled United States of America, Plaintiff, vs. Ole Berkness, Defendant, as the same appears on file and of record in this office.

"In witness whereof I have hereunto set my hand and the seal of the above-entitled court this 1st day of April, 1926.

"ROBT. W. TAYLOR,
"Clerk."

And the seal of said Court. We offer this in evidence.

Mr. MARQUAM.—We object for the reason stated in the objection to the previous offer.

The COURT.—The objection will be sustained and the offer denied.

Mr. HURLEY.—Save an exception.

The COURT.—Exception allowed.

(Testimony of T. J. McCroskey.)

"In witness whereof I have hereunto set my hand and the seal of the above-entitled court this 1st day of April, 1926.

"ROBT. W. TAYLOR,
"Clerk."

And the seal of said Court.

Mr. MARQUAM.—To which offer the defendant objects as the same is incompetent for the reason stated in our objection to the first offer made.

The COURT.—Objection sustained. Offer denied.

Mr. HURLEY.—Save an exception.

The COURT.—Exception allowed.

Q. Calling your attention to Plaintiff's Exhibit "D" for Identification, certified copy of search-warrant, inventory and return, I will ask you to state what that is.

A. This is a copy of a search-warrant with the Marshal's return of search made of the Ole Berkeness establishment on May 5th last year.

Mr. HURLEY.—We offer this in evidence and desire to read it in the record as Government's Exhibit "D." (Reading:)

GOVERNMENT'S EXHIBIT "D."

"In the United States Commissioner's Court for Fairbanks Precinct, Fourth Division, Territory of Alaska.

"SEARCH-WARRANT.

"In the Name of the United States of America, to G. B. Stevens, United States Marshal for the Fourth Division of the Territory of Alaska,

or Any of His Deputies and to Any Prohibition Agent for the Territory of Alaska, GREETING: [21]

"Information on oath having been this day laid before me by D. W. Flanigan, Federal Prohibition Agent for the Territory of Alaska, H. E. Seneff, Prohibition Agent for the Territory of Alaska, and T. J. McCroskey, Deputy United States Marshal for the Fourth Division of Alaska, and affidavits having been subscribed and sworn to by the said D. W. Flanigan, H. E. Seneff, and T. J. McCroskey, before me, the undersigned, and filed in the above-entitled court, charging that Ole Berkness has in his possession and stored and kept by him in that certain building situated on Lot 4 of Block 82 in the Town of Fairbanks, Alaska, intoxicating liquor and it appearing to the Court from the said affidavits that the said D. W. Flanigan, H. E. Seneff and T. J. McCroskey were within a short distance of said building on the 4th day of May, 1925, and that each of them could plainly smell the odor of intoxicating liquor from within said building and that the same came from intoxicating liquor kept and stored therein by the said Ole Berkness and that occasions before said 4th day of May, 1925, there was known to the said T. J. McCroskey, D. W. Flanigan and H. E. Seneff, that intoxicating liquor was being kept and stored in said building above described and the statements contained in said affidavits above referred to showing to this Court that intoxicating liquor is being kept and stored by the said Ole Berkness in the building above described, and the

Court being satisfied that liquor is kept and stored therein and existence of the grounds of the application for this search-warrant and finding that there is probable cause to believe that intoxicating liquor is kept and stored by the said Ole Berkness in the premises above described in violation of the provisions of the Act of Congress approved February 14th, 1917, commonly [22] known as the Alaska Dry Law.

"Now, therefore, you are hereby commanded at any time in the day or night to make immediate search of that certain building located on Lot 4 of Block 82 in the Town of Fairbanks, Alaska, as above described, and all appurtenances, for intoxicating liquor and if you find any intoxicating liquor seize and take the same together with all containers and bring the same forthwith to me at my office in Fairbanks, Alaska, to be disposed of according to law.

"Wherefore, fail not and make due return of this writ, together with your affidavit showing delivery of a copy of this writ, a receipt for the property taken and an inventory of the same as required by law.

"Dated at Fairbanks, Alaska, this 5th day of May, A. D. 1925.

"M. R. BOYD,

"United States Commissioner for Fairbanks Precinct."

And the seal of said Commissioner.

"Inventory of Property Seized from the Cabin of Ole Berkness.

"Cellar.

99 full bottles of beer.
1 sack bottle caps.
1 copper boiler.
1 50-gallon barrel of wine.

"Main Building.

6 cans malt syrup.
1 lot of empty bottles.
7 packages of hops.
11 pounds of caps.
1 50-gallon barrel full of beer mash.
1 watch.
3 feet *sa*phon hose.
1 beer thermometer.
8 glasses.
2 spiggots.
1 bottle labeled "Certo." [23]
1 small funnel.
1 bottle capper.
1 bill file and bills.
2 calenders.
15 pounds sugar.
15 pounds cornmeal.
12 pounds figs.
1 bunch keys.
1 large funnel.
2 pieces copper pipe.
1 sack corks.
6 bottles liquid having an odor of garlic.

"Yard.

5 sacks used hops.
1 50-gallon barrel empty.
1 100 pound butter barrel.
1 lot empty bottles.

"Cache.

1 10-gallon keg empty.
1 8-gallon still complete.
1 copper bottom wash-boiler.
1 50-gallon barrel cut down $\frac{1}{3}$.
1 lot empty bottles.

"Money.

"In Clothes-press.

Silver	$ 63 25	
Currency	1 00	

"In table drawer.

Dimes	1 30	
Nickles	80	$ 66 35

"In Cellar.

Gold 20s	40 00	
Currency 20s	100 00	
Currency 10s	40 00	
Currency 5s	15 00	195 00
		$261 35

1 Nugget Chain and charm.

"I, T. J. McCroskey, the officer by whom this search-warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant, on the 5th day of May, 1925.

Dated at Fairbanks, Alaska, this 6th day of May, 1925.

"T. J. McCROSKEY.

"Subscribed and sworn to before me this 6th day of May, 1925.

"M. R. BOYD.

"U. S. Commissioner and *Ex-officio* Justice of the Peace."

And the seal of the Commissioner. [24]

"In the United States Commissioner's Court for Fairbanks Precinct, Fourth Division, Territory of Alaska.

"United States of America,

"Territory of Alaska,—ss.

"MARSHAL'S RETURN ON SEARCH-WARRANT.

"I, G. B. Stevens, United States Marshal for the Fourth Division of the Territory of Alaska, do hereby certify and return that I received the original search-warrant to which this return is attached, at Fairbanks, Alaska, on the 5th day of May, 1925, and thereafter, on the 5th day of May, 1925, I duly executed the same by serving upon and delivering to Ole Berkness, a true and correct copy of said search-warrant and by searching the building described in said search-warrant, located on Lot 4 in Block 82 of the Town of Fairbanks, Alaska, and by seizing and taking into my possession certain contraband intoxicating liquor and property, a list of which is hereto attached and made a part of this return.

"I further certify and return that after making

said search and seizing said property, I gave a receipt to the said Ole Berkness for the said property so taken into my possession, a copy of which said receipt is hereto attached and made a part of this return, and a copy of the inventory filed herein, and I also delivered to the said Ole Berkeness a copy of the inventory of the said seized contraband liquor and property.

"Dated at Fairbanks, Alaska, this 6th day of May, 1925.

"G. B. STEVENS,
"United States Marshal.
"By John J. Buckley,
"Deputy."

"In the District Court for the Territory of Alaska, Fourth Division. [25]

"United States of America,
"Territory of Alaska,
"Fourth Judicial Division,—ss.

"CERTIFICATE.

"I, Rob't W. Taylor, Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, hereby certify that the foregoing and hereto attached five pages of typewritten matter, numbered from 1 to 5, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of search-warrant, inventory of property seized and Marshal's return on search-warrant, in Cause No. 2758, entitled United States of America, Plaintiff, vs. Ole Berkness, Defendant, as the same appears on file and of record in this office.

(Testimony of T. J. McCroskey.)

"In witness whereof I have hereunto set my hand and the seal of the above-entitled court this 1st day of April, 1926.

"ROBT. W. TAYLOR,
"Clerk."

And the seal of said Court.

Mr. MARQUAM.—To which offer the defendant objects as incompetent for the reasons stated in our objection to the first offer made.

The COURT.—Objection sustained. Offer denied.

Mr. HURLEY.—Save an exception.

The COURT.—Exception allowed.

Q. Mr. McCroskey, did you serve the search-warrant which has been offered in evidence and marked as Plaintiff's Exhibit "D" for Identification upon the plaintiff, Ole Berkness, on the 5th day of May, 1925?

Mr. MARQUAM.—Just a moment. We object as incompetent and irrelevant for the reason that the evidence under the search-warrant has been suppressed and that the search-warrant has been held by the [26] Court to be void and incompetent for any purpose.

The COURT.—Objection sustained.

Mr. HURLEY.—Save an exception.

The COURT.—Exception allowed.

Mr. HURLEY.—I would like to offer at this time to prove by this witness that on the 5th day of May, 1925, this witness, Mr. T. J. McCroskey, who was at that time Deputy United States Marshal for the Fourth Division, Territory of Alaska, served the

search-warrant, which has been offered in evidence, upon the defendant in this action and that he, together with H. E. Seneff, Prohibition officer, D. W. Flanigan, Federal Prohibition officer, searched the building located on Lot 4, Block 82 in the Town of Fairbanks, Fourth Division, Territory of Alaska, and that they found in this building located on Lot 4, Block 82, in the Town of Fairbanks, Alaska, in the possession of the defendant, Ole Berkeness, ninety-nine bottles of beer, one fifty-gallon barrel of wine, one fifty-gallon barrel of beer mash in the process of being manufactured, one eight-gallon still complete, together with the other contraband property used in connection with the manufacture and possession of intoxicating liquor described in the complaint and as shown by the inventory attached to the search-warrant which was offered in evidence, and that the defendant, Ole Berkeness, at that time and for a long time prior thereto, had stored in the building referred to in the complaint and was engaged on the 5th day of May, 1925, in said building in manufacturing intoxicating liquor in violation of the provisions [27] of the Alaska Dry Law.

Mr. MARQUAM.—To which offer the defendant objects as incompetent and irrelevant, inasmuch as all evidence under the alleged search-warrant has been suppressed for the reason that the building which was searched was the defendant's dwelling and occupied by him as such, and, therefore, all evidence offered and which was obtained by, under or through the execution of the search-warrant is inadmissible and incompetent.

(Testimony of H. E. Seneff.)

The COURT.—Objection sustained. Offer denied.

Mr. HURLEY.—Save an exception.

The COURT.—Exception allowed.

Mr. HURLEY.—That is all, Mr. McCroskey.

Mr. MARQUAM.—No cross-examination.

(Witness excused.)

TESTIMONY OF H. E. SENEFF, FOR THE GOVERNMENT.

H. E. SENEFF, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HURLEY.)

Q. Your name is H. E. Seneff? A. Yes, sir.

Q. What official position, if any, do you hold in Alaska? A. Prohibition officer.

Q. And were you a prohibition officer for Alaska on the 4th and 5th days of May, 1925? A. I was.

Q. Where were you stationed at that time, Mr. Seneff? A. Fairbanks. [28]

Q. Calling your attention to Government's Exhibit "B" for Identification, which has been offered in evidence and excluded by the Court, I will ask you to state if you signed this affidavit for search-warrant.

Mr. MARQUAM.—It seems to me that the affidavit having been marked for identification and offered and having been excluded by the Court, any further questions, even for identification, with

(Testimony of H. E. Seneff.)

reference to this exhibit are improper and we object to them for that reason.

The COURT.—I think I will sustain the objection. It is the same affidavit you have already offered?

Mr. HURLEY.—Yes, your Honor.

The COURT.—Objection sustained.

Mr. HURLEY.—Save an exception.

The COURT.—Exception allowed.

Q. I will ask you to state whether or not you assisted Mr. T. J. McCroskey, Deputy United States Marshal for the Fourth Division, Territory of Alaska, and Mr. D. W. Flanigan, Federal Prohibition Agent, in serving a search-warrant upon the defendant, Ole Berkeness, and in searching the cabin of the defendant, Ole Berkeness, located on Lot 4, Block 82 in the Town of Fairbanks, Alaska, on the 5th day of May, 1925.

Mr. MARQUAM.—We object to that for the reason that it is incompetent, irrelevant and immaterial inasmuch as the search-warrant was held to be void and all evidence concerning it or its execution is incompetent.

The COURT.—I think he may answer that.

A. Yes, sir.

Q. Calling your attention to Government's Exhibit "D" for [29] Identification, which has been offered in evidence and excluded by the Court, I will ask you to state if this is the search-warrant you assisted in serving on the defendant Ole Berkeness at that time. A. Yes, sir, it is.

(Testimony of H. E. Seneff.)

Q. In searching the cabin of the defendant, Ole Berkeness, and in serving this search-warrant upon the defendant, Ole Berkeness, at that time, what did you find in the cabin, Mr. Seneff?

Mr. MARQUAM.—To which question we object for the reason that it is incompetent, the search-warrant being void and the evidence obtained under it having been excluded by the Court. The question is incompetent.

The COURT.—Objection sustained.

Mr. HURLEY.—Save an exception.

The COURT.—Exception allowed.

Mr. HURLEY.—I offer at this time to prove by this witness that he, together with T. J. McCroskey, Deputy United States Marshal, and D. W. Flanigan, Federal Prohibition Agent for the Territory of Alaska, served the search-warrant marked Plaintiff's Exhibit "D" for Identification and which was offered in evidence and excluded by the Court, that he assisted in serving the search-warrant on Ole Berkeness on the 5th day of May, 1925, and searched the cabin of the defendant, Ole Berkeness, located on Lot 4, Block 82, in the Town of Fairbanks, Alaska, and that in this cabin he found ninety-nine full bottles of beer in the possession of the defendant, Ole Berkeness, one fifty-gallon barrel of wine, one fifty-gallon barrel of beer mash in the process of being [30] manufactured, one eight-gallon still complete, together with the other contraband property listed and described in the complaint on file in this action, and that the

defendant, Ole Berkeness, was in possession of the cabin and engaged therein in manufacturing intoxicating liquor in violation of the provisions of the Alaska Dry Law, and had stored in this cabin in his possession a large quantity of intoxicating liquor that had been stored there for some time, and that Ole Berkeness was engaged therein in maintaining a common and public nuisance as defined in Sections 19 and 20 of the Act of Congress approved February 14th, 1917, commonly known as the Alaska Dry Law.

Mr. MARQUAM.—To which offer the defendant objects as incompetent for the reason that it calls for the evidence alleged to have been procured in the execution of a void search-warrant, all evidence obtained under which has been excluded by the Court, and for the further reason that the offer proposes to prove conclusions of law as distinguished from facts.

The COURT.—Objection sustained. Offer denied.

Mr. HURLEY.—Save an exception.

The COURT.—Exception allowed.

Mr. HURLEY.—That is all, Mr. Scheff.

Mr. MARQUAM.—No cross-examination.

(Witness excused.)

Mr. HURLEY.—I would like to ask at this time that a copy of the petition for the suppression of evidence, which it was stipulated between counsel for the defendant, Mr. [31] Marquam, and myself, could be considered in this case, which was filed in the Criminal case entitled "United States

of America, Plaintiff, vs. Ole Berkeness," No. 944, may be copied in the record in this case in connection with the stipulation showing what the petition for the suppression of evidence was so we can have a record of it in this case.

Mr. MARQUAM.—I was going to make the same request so it would be clear as to what the situation was and that the ruling of the Court upon it in sustaining the motion would be shown by the record as having been made prior to the hearing.

The COURT.—Very well.

Mr. HURLEY.—I will furnish a copy of the original petition that was filed in the criminal case to the reporter so it can be copied in this record.

"In the District Court, Territory of Alaska, Fourth Division.

"No. 944—CRIMINAL.

"UNITED STATES OF AMERICA,
Plaintiff.

vs.

"OLE BERKENESS,
Defendant.

"PETITION FOR THE SUPPRESSION OF EVIDENCE.

"Comes now the defendant, Ole Berkeness, and by this petition shows that upon the 5th day of May, 1925, and prior thereto he was a resident of the town of Fairbanks, Alaska, and resided in that certain building located on Lot 4 Block 82 in the said town

of Fairbanks, which building is referred to in the indictment herein. [32]

"That said building situate upon said lot was at said time, to wit: upon the 5th day of May, 1925, and for a long time prior thereto and at all times since said date has been and is to-day the defendant's private dwelling and occupied by him as such.

"That on the 5th day of May, 1925, E. H. Seneff, W. D. Flanigan and T. J. McCroskey made affidavits before R. M. Boyd, United States Commissioner for the Fairbanks Precinct and filed the same with said Commissioner, which affidavits purport to show that intoxicating liquor was kept and stored by the said Ole Berkeness in the building above described, in violation of the Alaska Dry Law.

"That said affidavits were prepared, signed and filed with said Commissioner for the purpose of securing a search warrant for the search of said building, that copies of said affidavits are hereto attached, marked Exhibits 'A,' 'B,' and 'C,' and made part of this petition.

"That upon the strength of said affidavits and by reason thereof said R. M. Boyd, as United States Commissioner, did upon the 5th day of May, 1925, issue a search warrant directed to G. B. Stevens, United States Marshal for the Fourth Division of the Territory of Alaska, or any of his deputies, and to any prohibition agent for the Territory of Alaska directing them to search said building at any time in the day or night for intoxicating liquors and if any were found to dispose of the same according to law.

"That a copy of said search warrant is hereto attached, marked Exhibit 'D' and made part of this petition.

"That in compliance with the directing of said search warrant the said United States Marshal, by and through his deputy, T. J. McCroskey, executed said search warrant [33] with the assistance of the said D. W. Flanigan, H. E. Seneff and B. F. Thompson against the protests of the defendant, by searching defendant's private dwelling aforesaid.

"That as a result of said search certain articles and personal property were seized, an inventory of which is shown by the return of the United States Marshal on said search warrant and a copy of which return is attached, marked Exhibit 'E' and made part of this petition.

"That said transactions were had and certain acts performed, as is shown by the indictment herein, and as a result of which the indictment herein was returned by the Grand Jury.

"That the said search warrant issued by said United States Commissioner was unlawful and void and known to the said United States Marshal and his deputy, at the time of its issuance and execution to be unlawful and void and that the issuance and service of said search warrant violates all the constitutional rights of the defendant herein, all of which was known to the United States Marshal and his deputy at the time of the issuance and execution of the same, for the reason that it was not shown by the affidavits upon which said search warrant was based, nor does it appear upon the face of said

search warrant, that said building was occupied by the defendant as his dwelling, and was being used as a place of sale of intoxicating liquors.

"Wherefore, petitioner prays that all evidence of whatsoever nature gained by said United States Marshal or his deputy or any person or persons acting with, through, or under him in the unlawful search of said dwelling of defendant be suppressed, and that they and each of them be [34] restrained from using any information or evidence obtained by said unlawful search or in connection therewith, against this defendant in this case or otherwise.

"OLE BIRKENES,
"Petitioner.

"United States of America,
"Territory of Alaska,
"Fairbanks Precinct,—ss.

"Ole Berkeness being first duly sworn on oath deposes and says: That he is the defendant in the above-entitled action, that he has read the foregoing petition, knows the contents thereof and that the same is true as he verily believes.

"OLE BIRKENES.

"Subscribed and sworn to before me this 17th day of March, 1926.

"T. A. MARQUAM,
"Notary Public for Alaska.

"My commission expires March 20th, 1927."

Notarial seal of T. A. Marquam attached.

"Service of the foregoing by receipt of a copy thereof is hereby acknowledged this 19 day of March, 1926.

"JULIEN A. HURLEY,
"Attorney for Plaintiff."

"EXHIBIT 'A.'

"AFFIDAVIT FOR SEARCH-WARRANT.

"United States of America,
"Territory of Alaska.—ss.

"I, H. E. Seneff, being first duly sworn upon oath depose and say:

"That I am a Federal Prohibition Agent for the Territory of Alaska and as such agent have had a great deal of experience in handling intoxicating liquor and am familiar with the odor of the same;

"That on the evening of the 4th day of May, 1925, I was within about 50 feet of that certain building located on [35] Lot 4 of Block 82 in the Town of Fairbanks, Alaska, and could plainly smell the odor of intoxicating liquor and know that the same came from intoxicating liquor kept and stored therein by Ole Berkness, who is in possession and has the control of said building;

"That on the 3d day of May, 1925, I saw about 10 or 15 men going in and coming out of the above described building and on different and numerous occasions prior to the 3d day of May, 1925, I was within 10 or 12 feet of said building and could plainly smell the odor of intoxicating liquor from therein and know that said odor came from liquor

kept and stored by the said Ole Berkness in the building above described.

"H. E. SENEFF.

"Subscribed and sworn to before me this 5th day of May, A. D. 1925.

"[Seal] A. M. BOYD,

"United States Commissioner for Fairbanks Precinct."

"EXHIBIT 'B.'

"AFFIDAVIT FOR SEARCH-WARRANT.

"United States of America,

"Territory of Alaska,—ss.

"I, D. W. Flanigan, being first duly sworn upon oath depose and say:

"That I am a Federal Prohibition Agent for the Territory of Alaska and as such agent have had a great deal of experience in handling intoxicating liquor and am familiar with the odor of the same;

"That Ole Berkness has in his possession, in that certain building, situated on Lot 4 Block 82, of the Town of Fairbanks, Alaska, intoxicating liquor, which is kept and stored in said building by the said Ole Berkness, in violation [36] of the provisions of the Alaska Dry Law;

"That on the 4th day of May, 1925, I was within 10 or 12 feet of the building above described and could plainly smell the odor of intoxicating liquor and know that the said odor came from the said intoxicating liquor within the building above described; that at said time I could plainly hear several people talking within said building;

"That on the 3rd day of May, 1925, I was within a short distance of the above described building and could plainly smell the odor of intoxicating liquor and know that said odor came from intoxicating liquor kept and stored by the said Ole Berkness within the above described building; that at said time I heard loud talking within said building by several men such as would come from men who had been drinking.

"D. W. FLANIGAN.

"Subscribed and sworn to before me this 5th day of May, A. D. 1925.

"[Seal.] M. R. BOYD,

"United States Commissioner for Fairbanks Precinct."

"EXHIBIT 'C.'

"United States of America,

"Territory of Alaska,—ss.

"I, T. J. McCroskey, being first duly sworn upon oath depose and say:

"That I am a Deputy United States Marshal for the Fourth Division of the Territory of Alaska; that on the evening of the 4th day of May, 1925, I was within a short distance of that certain building located on Lot 4 of Block 82 and occupied and controlled by one Ole Berkness [37] and at said time I could plainly smell the odor of intoxicating liquor and know that the same came from liquor kept and stored by the said Ole Berkness, within said building;

"That on several occasions prior to the 4th day of May, 1925, I was within a very short distance of the building above described and could plainly smell the odor of intoxicating liquor and know that the same came from liquor kept and stored by the said Ole Berkness in the building above described; that as a Deputy United States Marshal, I have had a great deal of experience in handling intoxicating liquor and am familiar with the odor of the same.

"T. J. McCROSKEY.

"Subscribed and sworn to before me this 5th day of May, A. D. 1925.

"[Seal] R. M. BOYD,

"United States Commissioner for Fairbanks Precinct."

"EXHIBIT 'D.'

"In the United States Commissioner's Court for Fairbanks Precinct, Fourth Division, Territory of Alaska.

"No. 1396.

"SEARCH-WARRANT.

"In the Name of the United States of America: To G. B. Stevens, United States Marshal for the Fourth Division of the Territory of Alaska, or Any of His Deputies and to Any Prohibition agent for the Territory of Alaska, GREETING:

"Information on oath having been this day laid before me by D. W. Flanigan, Federal Prohibition

Agent for the Territory of Alaska, H. E. Seneff, Prohibition Agent for the Territory of Alaska and T. J. McCroskey, Deputy United States Marshal for the Fourth Division of Alaska, and affidavits [38] having been subscribed and sworn to by the said D. W. Flanigan, H. E. Seneff, and T. J. McCroskey, before me, the undersigned, and filed in the above entitled Court, charging that Ole Berkness has in his possession and stored and kept by him in that certain building situated on Lot 4 of Block 82 in the Town of Fairbanks, Alaska, intoxicating liquor and it appearing to the Court from the said affidavits that the said D. W. Flanigan, H. E. Seneff and T. J. McCroskey were within a short distance of said building on the 4th day of May, 1925, and that each of them could plainly smell the odor of intoxicating liquor from within said building and that the same came from intoxicating liquor kept and stored therein by the said Ole Berkness and that occasions before said 4th day of May, 1925, there was known to the said T. J. McCroskey, D. W. Flanigan and H. E. Seneff, that intoxicating liquor was being kept and stored in said building above described and the statements contained in said affidavits above referred to showing to this Court that intoxicating liquor is being kept and stored by the said Ole Berkness in the building above described, and the Court being satisfied that liquor is kept and stored therein and existence of the grounds of the application for this search-warrant and finding that there is probable cause to believe that intoxicating liquor is kept and

stored by the said Ole Berkness in the premises above described in violation of the provisions of the Act of Congress approved February 14th, 1917, commonly known as the Alaska Dry Law.

"Now, therefore, you are hereby commanded at any time in the day or night to make immediate search of that certain building located on Lot 4 of Block 82 in the Town of Fairbanks, Alaska, as above described and all appurtenances, [39] for intoxicating liquor and if you find any intoxicating liquor seize and take the same together with all containers and bring the same forthwith to me at *any* office in Fairbanks, Alaska, to be disposed of according to law.

"Wherefore, fail not and make due return of this writ, together with your affidavit showing delivery of a copy of this writ, a receipt for the property taken and an inventory of the same as required by law.

"Dated at Fairbanks, Alaska, this 5th day of May, A. D. 1925.

"[Seal] M. R. BOYD,

"United States Commissioner for Fairbanks Precinct."

"EXHIBIT 'E.'

"In the United States Commissioner's Court for Fairbanks Precinct, Fourth Division, Territory of Alaska.

"United States of America,
"Territory of Alaska,—ss.

"MARSHAL'S RETURN ON SEARCH-WARRANT.

"I, G. B. Stevens, United States Marshal for the Fourth Division of the Territory of Alaska, do hereby certify and return that I received the original search-warrant to which this return is attached, at Fairbanks, Alaska, on the 5th day of May, 1925, and thereafter, on the 5th day of May, 1925, I duly executed the same by serving upon and delivering to Ole Berkness, a true and correct copy of said Search Warrant and by searching the building described in said Search Warrant, located on Lot 4 in Block 82 of the Town of Fairbanks, Alaska and by seizing and taking into my possession certain contraband intoxicating liquor and property, a list of which is hereto attached and made a part of this Return. [40]

"I further certify and return that after making said search and seizing said property, I gave a receipt to the said Ole Berkenes for the said property so taken into my possession, a copy of which said receipt is hereto attached and made a part of this Return, and a copy of the Inventory filed

herein, and I also delivered to the said Ole Berkenes, a copy of the Inventory of the said seized contraband liquor and property.

"Dated at Fairbanks, Alaska, this 6th day of May, 1925.

"G. B. STEVENS,
"United States Marshal.
"By John J. Buckley,
"Deputy."

"Inventory of Property Seized from the Cabin of Ole Berkness.

"Cellar.

99 full bots. of beer.
1 sack bottle caps.
1 copper boiler.
1 50-gal. bbl. of wine.

"Main Building.

6 cans malt syrup.
1 lot of empty bottles.
7 pkgs. of hops.
11 pounds of caps.
1 50-gal. bbl. full of beer mash.
1 watch.
3 feet syphon hose.
1 beer thermometer.
8 glasses.
2 spiggots.
1 bot. labeled 'Certo.'
1 small funnel.
1 bot. capper.
1 bill file and bills.

2 calenders.
15 pounds sugar.
15 " cornmeal.
12 " figs.
1 bunch keys.
1 large funnel.
2 pcs. copper pipe.
1 sack corks.
6 bots. liquid having an odor of garlic.

"Yard.

5 sacks used hops.
1 50-gal. bbl. empty. [41]
1 100# butter bbl.
1 lot empty bottles.

"Cache.

1 10-gal keg empty.
1 8-gal still complete.
1 copper bottom wash-boiler.
1 50-gal. bbl. cut down 1/3.
1 lot empty bottles.

"Money.

In clothes-Press.

Silver	63.25	
Currency	1.00	
In table drawer.		
Dimes	1.30	
Nickles	.80	
		$ 66.35

"In Cellar.

Gold	20s	40.00	
Currency	20s	100.00	
	10s	40.00	
	5s	15.00	195.00
			$261.35

1 Nugget chain and charm."

Mr. HURLEY.—The plaintiff rests.

Mr. MARQUAM.—The defendant rests.

The COURT.—The case may be dismissed.

Mr. HURLEY.—We desire an exception to the ruling of the Court in dismissing the case.

The COURT.—Exception allowed. [42]

That thereafter and on the 21st day of May, 1926, findings of fact, conclusions of law and a decree were submitted to the Court and at the same time the plaintiff filed its objections to said findings of fact, conclusions of law and decree in words and figures, to wit: [43]

[Title of Court and Cause.]

OBJECTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE.

Comes now the plaintiff above named by its attorney, Julien A. Hurley, United States Attorney, and respectfully objects to the findings of fact, conclusions of law and decree submitted herein which are in favor of the above-named defendant and against the plaintiff for the reasons hereinafter contained as follows:

1. Plaintiff objects to findings of fact numbered I for the reason that the plaintiff herein offered to prove by the competent evidence of two witnesses that the defendant, Ole Berkeness, on the 5th day of May, 1925, had stored in that certain building situated on lot 4 of block 82, in the town of Fairbanks, Alaska, beer, wine and other intoxicating liquor and that said defendant had in his possession in said building, in addition to said liquors a still and paraphernalia used on connection with the storing and manufacturing of intoxicating liquor and that said defendant was then, and for a long time prior thereto had been, engaged in manufacturing liquor in said premises in violation of the provisions of Sections 19 and 20 of the Act of Congress, approved February 14, 1917, commonly known as the Alaska Dry Law.

2. Plaintiff objects to finding of fact numbered II for the reason that the affidavits for search-warrant and the search-warrant, offered in evidence by plaintiff and excluded by the Court, were legal and valid and in conformity with the provisions of the Alaska Dry Law and for the further reasons [44] that the petition for the suppression of the evidence, filed herein by defendant is not based upon the provisions of the Alaska Dry Law but upon the provisions of the National Prohibition Act which is not applicable to this suit and said petition should be overruled and disregarded by the Court.

3. Plaintiff objects to conclusions of law numbered I and II for the reasons that said conclusions

are in violation of the law of this suit, against the rights of the plaintiff and based upon erroneous findings of fact.

4. Plaintiff objects to the judgment and decree for the reason that the same is based upon erronous findings of fact and conclusions of law and for the further reason that it is in violation of the law of this suit and against the rights of the plaintiff.

Dated at Fairbanks, Alaska, this 21st day of May, 1926.

JULIEN A. HURLEY,
United States Attorney.

The foregoing objections having been duly considered are hereby disallowed and exception allowed as to each.

CECIL H. CLEGG,
District Judge. [45]

That the Court thereupon overruled plaintiff's objections to said proposed findings of fact and conclusions of law and decree, to which ruling of the Court plaintiff then and there excepted and said exception was allowed by the Court.

That thereafter and on the same day the Court duly made and signed said findings of fact, conclusions of law and decree, to all of which findings of fact, conclusions of law and decree plaintiff had theretofore objected, as hereinabove set forth, plaintiff then and there excepted to the rulings of the Court and the exceptions were duly allowed by the Court.

JULIEN A. HURLEY,
United States Attorney. [46]

[Title of Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 24th day of May, 1926, the plaintiff, United States of America, presented the foregoing bill of exceptions to the Court for settlement, which said bill of exceptions was served and filed within the time allowed by the orders of the Court, and the defendant having waived objections to said proposed bill of exceptions and it appearing to the Court, on examination of the proposed bill of exceptions, that it contains a full, true and correct record of the proceedings in connection with said matter and that the same is true and correct in all particulars, and contains all the material testimony, evidence, exhibits and other proofs offered or introduced by the respective parties during the hearing of said cause and the Court being fully advised in the premises, Now, therefore, upon motion, it is ordered that the foregoing proposed bill of exceptions be, and the same is, hereby approved, allowed and settled as the bill of exceptions in the above-entitled cause and made a part of the record herein, and that the same has been filed and presented within the time allowed by the rules and order of the Court, and that the Clerk of the court shall file said bill of exceptions as of this date.

Done at Fairbanks, Alaska, in open court, this 24th day of May, 1926.

CECIL H. CLEGG,
District Judge. [47]

[Title of Court and Cause.]

ASSIGNMENT OF ERROR.

Now on this 24th day of May, 1926, comes the above-named plaintiff, United States of America, by Julien A. Hurley, United States Attorney, and E. B. Collins, Assistant United States Attorney, and says that the decree entered in said cause on the 21st day of May, 1926, is erroneous and against the just rights of said plaintiff, for the following reasons, to wit:

I.

The Court erred in sustaining defendant's objection to the introduction in evidence of Plaintiff's Exhibit "A" for Identification, the same being the affidavit of T. J. McCroskey for a search-warrant.

II.

The Court erred in sustaining defendant's objection to the introduction in evidence of Plaintiff's Exhibit "B" for Identification, the same being the affidavit of D. W. Flanigan for a search-warrant.

III.

The Court erred in sustaining defendant's objection to the introduction in evidence of Plaintiff's Exhibit "C" for Identification, the same being the affidavit of H. C. Seneff for a search-warrant.

IV.

The Court erred in sustaining defendant's objection to the introduction in evidence of Plaintiff's Exhibit "D" for Identification, the same being the

search-warrant signed and issued by M. R. Boyd, United States Commissioner, and served upon the [48] defendant in this suit.

V.

The Court erred in sustaining defendant's objection to the question propounded to plaintiff's witness, T. J. McCroskey, as follows:

> "Q. Mr. McCroskey, did you serve the search-warrant which has been offered in evidence and marked as Plaintiff's Exhibit 'D' for Identification, upon the defendant, Ole Berkeness, on the 5th day of May, 1925"?

VI.

The Court erred in sustaining defendant's objection to the offer of plaintiff to prove by plaintiff's witness, T. J. McCroskey, the following:

> "Mr. HURLEY.—I would like to offer at this time to prove by this witness that on the 5th day of May, 1925, this witness, Mr. T. J. McCroskey, who was at that time Deputy United States Marshal for the Fourth Division, Territory of Alaska, served the search-warrant, which has been offered in evidence, upon the defendant in this action and that he, together with H. E. Seneff, Prohibition Officer, D. W. Flanigan, Federal Prohibition Officer, searched the building located on lot 4, block 82 in the Town of Fairbanks, Fourth Division, Territory of Alaska, and that they found in this building located on lot 4, block 82, in the Town of Fairbanks, Alaska, in the possession of the defendant, Ole Berkeness, ninety-nine bottles

of beer, one fifty-gallon barrel of wine, one fifty-gallon barrel of beer mash in the process of being manufactured, one eight-gallon still complete, together with the other contraband property used in connection with the manufacture and possession of intoxicating liquor, described in the complaint and as shown by the inventory attached to the search-warrant which was offered in evidence, and that the defendant, Ole Berkeness, at that time, and for a long time prior thereto, had stored in the building referred to in the complaint and was engaged, on the 5th day of May, 1925, in said building, in manufacturing intoxicating liquor in violation of the provisions of the Alaska Dry Law."

VII.

The Court erred in sustaining the objection made by defendant [49] to the question propounded to plaintiff's witness, H. E. Seneff, as follows:

"Q. Calling your attention to Government's Exhibit 'B' for Identification, which has been offered in evidence and excluded by the Court, I will ask you to state if you signed this affidavit for search-warrant."

VIII.

The Court erred in sustaining defendant's objection to the question propounded to the plaintiff's witness, H. E. Seneff, as follows:

"Q. In searching the cabin of the defendant, Ole Berkeness, and in serving this search-warrant upon the defendant, Ole Berkeness,

at that time, what did you find in the cabin, Mr. Seneff?"

IX.

The Court erred in sustaining defendant's objection to plaintiff's offer to prove by plaintiff's witness, H. E. Seneff, the following:

"Mr. HURLEY.—I offer at this time to prove by this witness that he, together with T. J. McCroskey, Deputy United States Marshal, D. W. Flanigan, Federal Prohibition Agent for the Territory of Alaska, served the search-warrant, marked Plaintiff's Exhibit 'D' for Identification and which was offered in evidence and excluded by the Court, that he assisted in serving the search-warrant on Ole Berkeness on the 5th day of May, 1925, and searched the cabin of the defendant, Ole Berkeness, located on lot 4, block 82, in the Town of Fairbanks, Alaska, and that in this cabin he found ninety-nine full bottles of beer in the possession of the defendant, Ole Berkeness, one fifty-gallon barrel of wine, one fifty-gallon barrel of beer mash in the process of being manufactured, one eight-gallon still, complete, together with the other contraband property listed and described in the complaint on file in this action, and that the defendant, Ole Berkeness, was in possession of the cabin and engaged therein in manufacturing intoxicating liquor in violation of the provisions of the Alaska Dry Law and had stored in this cabin in his possession a large quantity of intoxicating li-

quor that had been stored there for some time, and that Ole Berkeness was engaged therein in [50] maintaining a common and public nuisance as defined in sections 19 and 20 of the Act of Congress, approved February 14, 1917, commonly known as the Alaska Dry Law."

X.

The Court erred in dismissing this case.

XI.

The Court erred in overruling the objections, filed by plaintiff, to the findings of fact, conclusions of law and the decree, entered herein.

XII.

The Court erred in entering a judgment and decree in favor of the defendant and against the rights of the plaintiff.

JULIEN A. HURLEY,
United States Attorney.
E. B. COLLINS,
Assistant United States Attorney.

[Endorsed]: Filed May 24, 1926. [51]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Now on the 24th day of May, 1926, this cause coming on regularly to be heard upon the petition of the plaintiff, United States of America, for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and the Court being fully advised in the premises,—

IT IS HEREBY ORDERED that said plaintiff's appeal to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be, and the same is hereby, allowed and said plaintiff shall not be required to give or execute a cost bond on appeal.

Done in open court this 24th day of May, 1926.

CECIL H. CLEGG,
District Judge.

Entered in Court Journal No. 16, page 617.

[Indorsed]: Filed May 24, 1926. [52]

[Title of Court and Cause.]

DESIGNATION OF PLACE FOR HEARING ON APPEAL.

To the Honorable CECIL H. CLEGG, Judge of the Above-named Court, and to the Defendant, Ole Berkeness:

Comes now the appellant and pursuant to provision of the Act of Congress allowing appellant to designate the place of hearing of appeals does hereby designate the City and County of San Francisco, State of California, as the place of the hearing of the appeal in the above-entitled suit.

JULIEN A. HURLEY,
United States Attorney.
E. B. COLLINS,
Assistant United States Attorney.

[Endorsed]: Filed May 24, 1926. [53]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To Robert W. Taylor, Clerk of the Above-entitled Court:

You will please prepart transcript of the record in the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, upon the appeal heretofore perfected to said Court, and will include in said transcript the following papers and records, to wit:

1. Complaint.
2. Answer.
3. Journal entry showing trial by Court.
4. Findings of fact and conclusions of law.
5. Judgment and decree.
6. Notice of T. A. Marquam that he is no longer attorney in this case.
7. Bill of exceptions.
8. Order settling bill of exceptions.
9. Assignment of error.
10. Petitions for appeal.
11. Order allowing appeal.
12. Citation on appeal.
13. Designation of place for hearing.
14. Order extending time within which to perfect appeal.
15. Praecipe for transcript.
16. Affidavit of service. [54]

This transcript to be prepared as required by law and the orders and rules of this court and of

the United States Circuit Court of Appeals for the Ninth Circuit, and to be filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, on or before the 14th day of August, 1926, pursuant to order of this Court extending time.

Fairbanks, Alaska, this 24th day of May, 1926.

JULIEN A. HURLEY,
United States Attorney,
E. B. COLLINS,
Assistant United States Attorney,
Attorneys for Plaintiff.

[Endorsed]: Filed May 24, 1926. [55]

[Title of Court and Cause.]

AFFIDAVIT OF SERVICE.

United States of America,
Territory of Alaska.—ss.

I, Julien A. Hurley, being first duly sworn upon oath depose and say: That on the 21st day of May, 1926, T. A. Marquam, Esq., filed a notice in the above-entitled cause to the effect that he had withdrawn as attorney for defendant and was no longer attorney in said suit; that on the said 21st day of May, 1926, the said T. A. Marquam refused to accept service or to receive a copy of the bill of exceptions filed herein; that on the 22d day of May, 1926, in Fairbanks, Alaska, I duly served the bill of exceptions, order settling bill of exceptions,

assignment of error, petition for appeal, order allowing appeal, citation on appeal, designation of place for hearing, order extending time within which to perfect appeal and the praecipe for transcript by delivering full, true and correct copies thereof to the above-named defendant, Ole Berkeness, personally, as the same appear upon the record in the above-entitled cause; that the said defendant received and accepted said copies as above stated but then and there refused to admit service of the same in writing; that I am United States Attorney for the Fourth Division of the Territory of Alaska and attorney for the above-named plaintiff in this suit.

JULIEN A. HURLEY,
United States Attorney. [56]

Subscribed and sworn to before me this 24th day of May, 1926.

[Seal] ROBT W. TAYLOR,
Clerk District Court, for the District of Alaska, Fourth Division.

[Endorsed]: Filed May 24, 1926. [57]

In the District Court for the Territory of Alaska,
Fourth Judicial Division.

United States of America,
Territory of Alaska,
Fourth Judicial Division,—ss.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Rob't W. Taylor, Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, hereby certify that the foregoing and hereto attached fifty-seven pages of typewritten matter, numbered from 1 to 57, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of Transcript of Record of Cause No. 2758, entitled United States of America, Plaintiff, vs. Ole Berkeness, Defendant, as listed on the General Index attached, as the same appears on file and of record in this office.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this 22 day of June, 1926.

[Seal] ROB'T W. TAYLOR,
Clerk.

By Claire Stanfield.
Deputy. [58]

[Title of Court and Cause.]

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. May 24, 1926. Rob't W. Taylor, Clerk. By Claire Stanfield, Deputy.

CITATION ON APPEAL.

The President of the United States of America, To the Above-named Appellee, Ole Berkeness, GREETING:

You are hereby cited to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, State of California, within thirty (30) days from the date of this citation, pursuant to an order allowing an appeal, made and entered in the above-entitled cause, in which the United States of America is the plaintiff and appellant and Ole Berkeness is the defendant and appellee, to show cause, if any there be, why the decree and order made and entered in said suit on the 21st day of May, 1926, as in said order allowing appeal is mentioned, should not be set aside and reversed, and why speedy justice should not be done to said appellant above named in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States of America, on this 24th day of May, 1926, and the year of our Independence the one hundred and fiftieth.

Attest my hand and the seal of the above-named court this 24th day of May, 1926.

[Seal] CECIL H. CLEGG,
District Judge.

[Title of Court and Cause.]

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. May 24, 1926. Robt. W. Taylor, Clerk. By Claire Stanfield, Deputy.

PETITION FOR APPEAL.

The plaintiff, United States of America, considering itself aggrieved by the decree made and entered on the 21st day of May, 1926, in the above-entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of error, which is filed herewith; and it prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

JULIEN A. HURLEY,
United States Attorney.
E. B. COLLINS,
Assistant United States Attorney.
Attorneys for Plaintiff.

[Title of Court and Cause.]

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. May 24, 1926. Rob't W. Taylor, Clerk. By Claire Stanfield, Deputy.

ORDER EXTENDING TIME TO AND INCLUDING AUGUST 14, 1926, WITHIN WHICH TO PERFECT APPEAL.

On this day the above-entitled cause came on to be heard before the Judge of the above-named court, on application of the plaintiff, United States of America, for an order extending the time within which to perfect its appeal herein; and no objections appearing and good cause being shown, and it appearing to the satisfaction of the Court that the thirty (30) days time allowed in the citation on appeal within which appellant should prepare and file his record herein with the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, is insufficient for said purpose, now, therefore,

IT IS ORDERED that the time within which said appellant shall perfect said cause on appeal and docket and file the record thereof in the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, be, and the same is hereby enlarged and extended to and including the 14th day of August, 1926.

Done in open court this 24th day of May, 1926.

CECIL H. CLEGG,
District Judge.

Entered in Court Journal No. 16, page 617.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO ORIGINAL PAPERS.

I, Rob't W. Taylor, Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, hereby certify that the foregoing and hereto attached three pages of typewritten matter, numbered from 1 to 3, inclusive, constitute the original papers in Cause No. 2758, entitled United States of America, Plaintiff, vs. Ole Berkness, Defendant, as follows:

Citation on appeal.

Petition for appeal.

Order extending time within which to perfect appeal.

Duplicate copies are retained in this office.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this 22 day of June, 1926.

[Seal] ROB'T W. TAYLOR,
Clerk.

By Claire Stanfield,
Deputy.

[Endorsed]: No. 4901. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Ole Berkeness, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Alaska, Fourth Division.

Filed July 6, 1926.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

69–70 [Minute entry of submission, Nov. 8, 1926, omitted in printing.]

71 **United States Circuit Court of Appeals**

UNITED STATES OF AMERICA, APPELLANT vs. OLE BERKENESS, APPELLEE	No. 4901

Order directing filing of opinion and filing and recording of decree

Filed Nov. 15, 1926

By direction of the honorable William B. Gilbert and Frank H. Rudkin, Circuit Judges, and William P. James, District Judge, before whom the above cause was heard, ORDERED that the typewritten opinion this day rendered by this court in the above-entitled cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the opinion.

72 In the United States Circuit Court of Appeals

[Title omitted.]

Opinion

Filed Nov. 13, 1926

Before GILBERT and RUDKIN, Circuit Judges, and JAMES, District Judge

JAMES, District Judge:

This appeal, taken by the United States, presents the question as to whether a search warrant may be issued under the provisions
73 of the bone-dry act, affecting only Alaska Territory, where the place to be searched is used as a dwelling, without a showing first made under oath that intoxicating liquor is being sold therein. The national prohibition act, (sec. 25, Title II), requires such evidence to be presented before a search warrant shall issue.

The action was one authorized to be brought under the Alaska dry act, which declares any place to be a nuisance where alcoholic liquors are "manufactured, stored, sold, or vended, given away or vended contrary to law." (Secs. 19, 20, 39 Stats. 903.) The district judge sustained a preliminary motion of appellee to exclude evidence as to liquor found in a cabin occupied by appellee on the ground that such evidence was illegally secured. Rulings followed sustaining objections to the offer made by the district attorney to show that the liquor seized as evidence was taken under a search warrant issued upon the sworn statements of witnesses. The affidavits were sufficient in their statement of facts to justify the terms of the Alaska

prohibition act and to justify the issuance of the search warrant. (Sec. 17, act above cited.) That the national prohibition act did not work a repeal of the prohibition law, made specially for Alaska, has been decided in several cases in this circuit. (Abbate v. United States, 270 Fed. 735; Simpson v. United States, 290 Fed. 763; Peterson v. United States, 297 Fed. 1000.) In the Peterson case the conclusion of the court was thus summed up (p. 1001):

"The two laws, national prohibition act and Alaska dry law, are in force in Alaska, with the qualification that if there are in-
74 consistencies in any of their provisions the national prohibition act must prevail."

The inconsistency which will nullify the law applicable to the local Territory must be one concerned with the main purpose of the national act, so that its effect upon a right conferred or restriction declared will be to diminish or relax either. Intoxicating liquor, by permit, may be possessed under the terms of either act for certain purposes. Under neither act may intoxicating liquor be otherwise possessed. So it will not do to adopt the argument of counsel for the Government that the search-warrant provisions of the national prohibition act have to do with conditions different and inapplicable to the enforcement of the Alaska dry law. The purpose, as we here conceive it to be, of Congress when it adopted the national prohibition act and provided particularly what the conditions to a search of a private dwelling should be, was to occupy that ground fully and to the exclusion of laws of such local effect as that here considered. So acting, it impressed a limitation on the right to search a private dwelling which is available to residents of Alaska equally with those in other portions of the United States.

The decree of dismissal is affirmed.

[File endorsement omitted.]

75 United States Circuit Court of Appeals

[Title omitted.]

Decree

Filed Nov. 15, 1926

Appeal from the District Court of the United States for the Territory of Alaska, Fourth Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Territory of Alaska, *Fourther* Division, and was duly submitted:

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the judgment of dismissal of the said District Court in this cause be, and hereby is, affirmed.

[File endorsement omitted.]

76 United States Circuit Court of Appeals

[Title omitted.]

Order staying issuance of mandate

Filed Dec. 8, 1926

Upon consideration of the application by telegram of Mr. Julien Hurley, United States attorney, counsel for the appellant, and good cause therefor appearing, IT IS ORDERED that the issuance of the mandate under rule 32 of this court be, and hereby is, stayed until January 18, 1927.

FRANK H. RUDKIN,
United States Circuit Judge.

Dated: SAN FRANCISCO, CALIFORNIA, *December 8, 1926.*

[File endorsement omitted.]

77 [Clerk's certificate to foregoing transcript omitted in printing.]

78 Supreme Court of the United States

Order allowing certiorari

Filed April 18, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

○